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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. 79-1272

WARDEN EVERETT I. PERRIN, JR.
ET AL, Petitioners

v.

RICHARD HENRY and ROBERT
A. STEIN, ESQ., Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, Richard Henry a prisoner incarcerated at the New Hampshire State Prison and Robert A. Stein, Esquire, a private attorney licensed to practice law in the State of New Hampshire, respectfully requests that this Court deny the

petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 609 F.2d 1010.

QUESTION PRESENTED

Whether the requirement of the New Hampshire Prison that visitors submit their files for a page-by-page search is in violation of the Fourth and Sixth Amendments when applied to the privileged client files of a defense attorney entering the Prison to interview a court-appointed client charged with escape.

STATEMENT OF THE CASE

The pertinent facts in this case are set out in the opinions of the lower courts reproduced at pages 42 and 51 of the Appendix to the Petition. The decision of the Court of Appeals was to "remand the case to the District Court with instructions that it receive evidence on

the issue whether the needs of the prison can be served with less actual or reasonable feared infringement upon an inmate's right of counsel than the present inspection policy as applied to documentary materials." 609 F.2d 1010, 1014. Petition at 50. Commencement of those proceedings have been deferred until decision is reached on the Petition before this Court.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE PETITION IS PREMATURE BECAUSE THE QUESTION PRESENTED HAS NOT BEEN DECIDED BY THE COURT OF APPEALS' INTERLOCUTORY OPINION AND IS THE SUBJECT OF FURTHER EVIDENTIARY HEARINGS.

In its decision, the Court of Appeals for the First Circuit determined that it was necessary to remand the case to the District Court with instructions that it hold further hearings to supplement the very skimpy trial record. 609 F.2d at 1014. Appendix to Petition at 50. The determination

of the Court of Appeals that the trial record should be supplemented does not raise any Constitutional or statutory issues which are appropriate for resolution by this Court.

For reasons totally unfathomable, petitioners treat the opinion of the Court of Appeals as a final determination on the merits of the underlying Constitutional issue and seek review of a decision which has not yet been decided. It is clear on the fact of the opinion that not only did the Court of Appeals not decide the Question Presented in this Petition but it resolved that further factual information was required before that issue was ripe for decision. Instead of helping to produce that evidence, Petitioners have delayed its introduction by seeking a before-the-fact review from this Court.

Petitioners raise the spector that the Court of Appeals decision will require a separate hearing for each search. But that

claim has no basis in the Court's opinion nor in the relief sought by Respondents. Indeed, Respondents seek the formulation of a Constitutionally based rule for attorney searches which would prevent further controversies from arising. The fact that the Court of Appeals has determined that further hearings are necessary to determine the Constitutional parameters within which the rule must be drafted, does not in any way imply that once the rule is formulated, a hearing will be necessary before each search.

Petitioners also express concern that the Court has required of prison authorities "the task of demonstrating that the legitimate purposes of the institution be equally well served by means less threatening to individual Constitutional rights.". 609 F.2d at 1013-1014. Appendix to Petition at 48. Petitioners have not produced any law inconsistent with this standard, but

event if this standard was somehow Constitutionally defective, there remains the possibility that Petitioners will be able to satisfy the standard, entirely removing the need for this petition.

By denying certiorari, this Court will permit the District Court to hold hearings and both courts below to reach final decisions on the underlying Constitutional issue. Should petitioners remain aggrieved after the final decision is reached, they retain the option of filing for certiorari at that time. If certiorari was then to be granted, this Court would have the benefit of the Court of Appeals decision as well as a far fuller factual record than currently exists.

II. THE INTERLOCUTORY DECISION OF THE COURT OF APPEALS DOES NOT EFFECT PRISON PROCEDURES.

Petitioners' claim of hardship, which is the only conceivable basis for their request that the case be removed from the lower court's

before their hearings are completed, is totally belied by their own action. Although petitioners claim that the Court of Appeals decision "has effectively granted to all attorneys the virtually unlimited ability to carry into prisons whatever they might choose, free from even a routine visual security inspection," Petition at 31,* they also acknowledge that <u>after</u> the filing of the First Circuit opinion the Prison adopted an attorney search regulation which "does not alter the previous procedure in any material way." Petition at 30, n.4 The fact that that regulation - which calls for a "thorough and comprehensive search" of an attorney's privileged files - is being enforced, and that the search procedure remains virtually identical to that employed when this suit was filed, demonstrates that

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*The regulation is reproduced in the Petition beginning at page 37.

Petitioners' claim of sweeping impact is totally spurious. While the fact that Petitioners adopted a regulation so inconsistent with their interpretation of the Court of Appeals decision casts doubt on their good faith, it does not provide any basis for the granting of the Petition.

Petitioners claim hardship because "(r)espondents and the District Court have both indicated their belief that this new regulation does not suffice." Petition at 30 n.4. Again, Petitioners completely misread the opinions below. In fact the District Court has not expressed any opinion about the case since the remand. The only post-remand opinion or orders have been filed by the Federal Magistrate, and neither of them ventures any opinion about the rule's Constitutionality.* As to the beliefs of

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*The two orders issued are reproduced in Appendix to this brief.

Respondents, they do not (unfortunately) have any power in and of themselves to impose hardship upon Petitioners.

Petitioners' claims that the Court of Appeals remand has the effect of protecting attorneys from even routine visual security inspection and imposes upon the Prison the need to judicially demonstrate the appropriateness of each search are completely without basis. Not only does the Court's opinion refrain from deciding the Constitutionality of the search procedure cufrently employed, it is explicitly limited to the specific controversy raised in this case. As the opinion states: "(w)e stress that we confine this ruling to the particular congeries of facts before us: a page by page scrutiny for textual contraband by a prison guard of an attorney's file relating to the defense of his inmate client against a charge of attempted escape." 609 F.2d 1014. Petition at 49. For reasons developed in the opinion,

each of those facts are crucial. The Court's emphasis upon them indicates a likelihood that the final decision, when it is reached, will be narrow, and renders petitioners' hardship claim even more untenable.

III. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH PRIOR CASE LAW.

Petitioners' claim that the Court of Appeals decision is in direct conflict with Wolff v. McDonnell founders over their total misapprehension about the opinion's scope. Petitioners' statement of the Court's holding, Petition at 18, once again reflects the crucial point that the Court of Appeals has not resolved the Constitutional issue and entirely ignores all the specific limiting facts of this case which are carefully set out in the Court's opinion.

This case raises one aspect of the more general question of what type of prison searches can be performed on the confidential files of lawyers who are visiting their clients.

Because this issue has not been resolved in prior opinions, the Court of Appeals has faithfully applied the principles set forth in analogous areas and recognized the need to supplement the trial record prior to final decision. In applying those principles, the Court has also noted the factual differences between the cases which may require different results. The Petition employs the contrary strategy of lumping all the cases together and passing over their differences in order to produce a conflict where none exists.

Petitioners attempt to create a conflict between the Court of Appeals decision and this Court's opinion in Wolff v. McDonnell, 418 U.S 539 (1974) ignores the fact that the Sixth Amendment claim which is crucial here was dismissed in Wolff because that case involved correspondence relating to civil as well as criminal matters. 418 U.S. at 576. Further, the Wolff opinion notes the

administrative burden placed upon a prison if it must determine whether the sender of a letter is in fact an attorney. By way of contrast, in the visitation context, the attorney can readily identify himself. Finally, the issue in Wolff is whether the letter could be opened in the prisoner's presence. Here the dispute is not over whether an attorney's file can be opened but whether it can be subjected to page-by-page inspection. With respect to the lower court opinions cited in the Petition, Petitioners do not even attempt to address the clearly distinguishing factors cited in the Court of Appeals decision. Although these cases, which involve significantly different issues, may offer guidance, they do not resolve the central issues in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Respondents

APPENDIX

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Order of February 7, 1980 of the Magistrate of the District Court, District of New Hampshire 17

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Richard Henry, et al

v. Civil Action No. 78-301-D

Gerald L. Perrin, Warden, et al

ORDER

A pretrial was held on January 10, 1980 with Robert Stein, Esq., Arpiar Saunders, Esq., and Steven McAuliffe, Esq. of the Attorney General's office, present.

Attorney Stein advised that Richard Henry is still in custody in the New Hampshire State Prison serving a sentence for an unrelated criminal conviction. There is to be a final pretrial on February 28, 1980, and trial on March 10, 1980 in State of New Hampshire v. Henry. Attorney Stein has not directl conferred with Mr. Henry concerning the criminal case because the prison authorities are still insistant on searching and reading the contents of attorney's files.

Attorney McAuliffe advised that the State has drawn up new regulations regarding search of attorneys and attorney's files as a prerequisite to entering and leaving the prison. These regulations have been adopted on an emergency basis and are being enforced. He further advised that the State intends to seek certiorari in the United States Supreme Court.

Under the circumstances, it does not appear that this court can proceed to find a way to "harmonize the interest of the prison without impinging on appellant's right to counsel . . . "

as Ordered by the United States Court of Appeals for the First Circuit No. 78-1528 Richard Henry, et al v. Everett I. Perrin, etc., et al (decided 11/21/79) until that decision becomes final or is reversed.

It is unfortunate that the parties have taken such hard and uncompromising positions in this case, but apparently, this is the nature of the beast. The court stands ready to assist in charting a course between the Scylla of constitutional right to counsel and the Charybdis of prison security.

United States Magistrate

Date: January 14, 1980

cc: Robert A. Stein, Esq.
Steven J. McAuliffe, Esq.

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Richard Henry, et al

v. Civil Action No. 78-304-D

Everett I. Perrin, Jr., Warden

O R D E R

The State has filed a motion to reconsider seeking to strike "because the prison authorities are still insistant on searching and reading the contents of attorney's files "for my Order of January 14, 1980. Paragraph (d) of the emergency regulation states in part:

> "Specifically, the inspecting guard shall not scrutinize any material designated as privileged for textual contraband, but shall merely look without reading to insure that no other form of contraband is contained therein. The guard shall not conduct even a brief spot viewing of each, or any, page of confidential documents, but will open, flip through, separate, and look among such papers in a cursory, but sufficiently thorough, manner to insure the absence of concealed contraband other than textual. The attorney shall insure that no attempt to read any confidential material occurs, and shall report any suspected violation to the Warden or his deputy immediately."

The State argues that Judge Devine in his Order and Opinion dated October 23, 1978 page 8 found that any cursory type examination of privileged information in an attorney's file would be de minimus, but this was reversed on appeal. The Circuit Court of Appeals pointed out in its Opinion in Henry v. Perrin, No. 78-1528, slip. op. at 3, (1st Cir. November 29, 1979).

> "Inspection, they contend, is not reading and prison authorities have a right to inspect all visitors for possession of contraband. While appellees would have us conclude that this proposition disposes of this appeal, we view the novelty of the act as requiring close analysis." Id., at 3.

and goes on to point out that

> "Given the facts, as we have noted, that appellant Henry's Sixth Amendment right to counsel is directly impinged upon, i.e., that the important and privileged information in a lawyer's file is vulnerable to disclose, or at least that the fear of meaningful disclosure is reasonable, but even a brief spot viewing of each page, . . ." Id., at 7.

The State's regulations explicitedly recognize that there is a danger that a guard may read privileged material in an attorney's file and then placed the onus on the attorney to supervise the guard's inspection of the attorney's file which the attorney does not want inspected in the first place.

The State next argues that privileged material cannot be read, is not read, and will not be read by inspecting guards, but the Circuit Court of Appeals points out that it is not only the reading of privileged material, but the reasonable fear of meaningful disclosure which is protected by the Sixth Amendment.

Finally, the State argues that the objectionable language is potentially prejudicial to the defendant's case on appeal because " . . . the Magistrate's observation directly conflicts with this court's initial opinion in the case and the provisions of the emergency regulation recently enacted in response to the Court of Appeal's Opinion."

Motion to Reconsider is denied.

I would note in passing that the plaintiff finds himself on the horns of a dilemma for he must either have his attorney submit his privileged file to a prison guard as a condition of entry into prison for the purpose of preparing for trial or refusing to have his attorney submit his privileged file to a prison guard and be denied entry into the prison for the purpose of preparing for trial.

/s/ William B. Terry, Jr.
United States Magistrate

Date: February 7, 1980

cc: Robert A. Stein, Esq.
Steven J. McAuliffe, Esq.